MOHAMED YUSOFF SHAIK MADAR v. NOR HAZLIZA ISMAIL & ANOR

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL APPEAL NO: PA-12A-14-04-2022]
27 JANUARY 2023

Abstract – *Once the High Court dismisses any application to strike out a writ and a pleading, there is no longer a right to appeal to the Court of Appeal against the High Court decision. This was brought about by the amendment to s. 68 of the Courts of Judicature Act 1964. Specifically, paras. 68(1)(e) to (f) have taken away the right to appeal to the Court of Appeal, when an application for summary judgment or to strike out is dismissed and when an application to set aside a judgment in default is allowed. The rationale is so that the appellate courts are no longer inundated with interlocutory appeals.*

CIVIL PROCEDURE: *Appeal – Appeal against decision of High Court – Right of appeal – Amendments to s. 68 of Courts of Judicature Act 1964 – No appeal to Court of Appeal when High Court dismisses application to strike out writ or pleading – Plaintiff's appeal heard and allowed after amendments to sub-s. 68(1) came into effect – Whether rendered appeal of no effect*

CIVIL PROCEDURE: *Action – Cause of action – Cause of action for defamation – Remedy sought related to damages for tort of defamation – Whether defences raised were substantive or tenable defence against defamation – Whether trial judge failed to appreciate difference between defamation action and judicial review – Whether wrong in striking out claim for non-compliance with O. 53 of Rules of Court 2012 – Whether limitation period of three months to file for judicial review applicable*

The plaintiff was an employee of the second defendant, Majlis Bandaraya Pulau Pinang ('MBPP'), for 39 years until he retired in 2020. The first defendant was the 'Akauntan Hasil Jabatan Perbendaharaan MBPP'. The plaintiff pleaded, *inter alia*, that MBPP issued a letter dated 7 February 2019 under the MBPP's letterhead to the plaintiff, that contained words that are libellous of the plaintiff. The letter was not put in an envelope. It was given, published and distributed to third parties in the 'Jabatan Perkhidmatan Perbandaraan MBPP', who could read and access the contents. The plaintiff pleaded the allegedly defamatory words, and the natural, ordinary as well as the innuendo meanings of the impugned words. As a result, the plaintiff suffered loss and damage. The plaintiff sought the remedy for damages – general damages, exemplary damages, aggravated damages and special damages of RM429.68, the amount which related to the assets belonging to the MBPP that were lost or stolen. The MBPP held the plaintiff responsible

for the lost assets and claimed the amount from the plaintiff. When the plaintiff did not pay the RM429.68, the defendants issued the 7 February 2019 letter and deducted that amount from the plaintiff's salary.

The judgment herein dealt with the applicability of the recent amendments to s. 68 of the Courts of Judicature Act 1964 ('CJA'). Section 68 provides that no appeal can be brought to the Court of Appeal ('CA') when the High Court ('HC') dismisses an application to strike out a writ or a pleading. Here, the defendants in the Sessions Court ('SC') suit filed an application to strike out the plaintiff's writ and statement of claim. The SC allowed their application. Hence, the plaintiff appealed to the HC and the HC allowed the decision, in that, the SC decision was reversed. Hence, the issue as to whether the defendants have the right to appeal to the CA against the HC decision.

Held (allowing plaintiff's appeal; dismissing defendants' striking out application):

(1) The latest amendments to sub-s. 68(1) of the CJA, which came into force on 1 October 2022, curtailed appeals or further appeals to the CA. The SC allowed the defendants' application to strike out on 15 April 2022. The plaintiff filed his appeal on 19 April 2022. The appeal was heard and allowed on 30 December 2022, *ie*, after the date that the amendments to sub-s. 68(1) came into effect. Therefore, the current sub-s. 68(1), specifically through para. (f), was applicable to this appeal, rendering this appeal of no effect. (paras 15 & 19-21)

(2) The plaintiff was not challenging the MBPP's decision nor the process that led to the deduction of his salary. Instead, the plaintiff's pleadings disclosed that he was suing the defendants under the cause of action of defamation, an entirely distinct cause of action than a cause for judicial review. He sought, not for any administrative or public law reliefs such as *certiorari* or *mandamus* or prohibition, but for the remedy of damages for the tort of defamation. (paras 26-28 & 30)

(3) Since the plaintiff was not filing for judicial review, his compliance with the limitation period of three months to file for judicial review was not applicable. It followed that the issue of whether the plaintiff complied with O. 53 of the Rules of Court 2012 ('ROC'), which governs the procedure for judicial review, was not applicable. (para 32)

(4) The defendants, on the other hand, did not plead the usual defences against defamation, such as, justification or fair comment or qualified privilege. Rather, the defendants' defences included the plea that the plaintiff (i) had no claim against the defendants; (ii) used wrong mode of originating process; and (iii) the plaintiff's claim was an abuse of the court process. These defences did not give a defendant a substantive or tenable defence against a defamation suit. (para 47)

(5) The SCJ had fundamentally failed to appreciate the cause of action of defamation, as well as failed to appreciate the marked difference between a cause in defamation and a cause for judicial review. The SCJ was plainly wrong in his decision to strike out the plaintiff's claim on the ground that the plaintiff had failed to follow the requirements under O. 53 of the ROC in this defamation suit. Order 53 was not applicable. Instead, it was O. 78 for defamation actions that was applicable to the plaintiff's claims. (paras 51, 57 & 59)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(dist)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***

United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors [1993] 3 CLJ 612 SC ***(refd)***

YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 28(1), 68(1)(e), (f)
Rules of Court 2012, O. 18 r. 19(1), O. 53 r. 2(4), O. 55 r. 2, O. 78
Specific Relief Act 1950, ss. 44, 45, 46, 47, 48, 49

For the appellants - Amareson, Kernail Singh & Dilsimran Kaur; M/s Baljit Singh & Company
For the respondent - Murgan & Thanganachiar; M/s Presgrave & Matthews

Reported by S Barathi

JUDGMENT

Kenneth St James JC:

[1] This judgment deals with the applicability of the recent amendments to s. 68 of the Courts of Judicature Act 1964 (CJA).

[2] Section 68 provides that no appeal can be brought to the Court of Appeal when the High Court dismisses an application to strike out a writ or a pleading.

[3] Here, the defendants in the Sessions Court suit filed an application to strike out the plaintiff's writ and statement of claim. The Sessions Court allowed their application. The plaintiff appealed to the High Court. I allowed the plaintiff's appeal, that is, I reversed the decision of the Sessions Court. Effectively, I dismissed the defendants' application to strike out.

[4] The issue is – do the defendants have the right to appeal to the Court of Appeal against my decision, when my decision was to effectively dismiss their application to strike out?

Section 68 Of The CJA

[5] The amended s. 68 of the CJA came into force on 1 October 2022: the Federal Government *Gazette* dated 19 September 2022, P.U.(B) 451/ 2022.

[6] The current sub-s. 68(1) reads as follows:

> Section 68 Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand Ringgit, except with the leave of the Court of Appeal;
>
> (b) where the judgment or order is made by consent of parties;
>
> (c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal;
>
> (d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final;
>
> (e) where a High Court dismissed any application for a summary judgment;
>
> (f) **where a High Court dismissed any application to strike out any writ or pleading; and**
>
> (g) where a High Court allowed any application to set aside a judgment in default.
>
> (emphasis added)

[7] If the High Court dismisses an application to strike out a writ and a pleading, such as an application under O. 18 r. 19 of the Rules of Court 2012 (ROC), there is no longer a right to appeal to the Court of Appeal against the High Court's decision.

[8] It is true that my decision to dismiss the defendants' application to strike out did not emanate from a High Court suit. It started from a Sessions Court suit. In the Sessions Court suit, the defendants applied to strike out. The Sessions Court allowed their application. The plaintiff, whose suit was struck out, appealed to the High Court. I heard and allowed his appeal. And it is against my decision that the defendants are now appealing to the Court of Appeal.

[9] But the appeal that I heard is an interlocutory appeal. Interlocutory appeals are determined by the process of re-hearing. In other words, when I heard this striking out appeal, it was as if I re-heard the application to strike out that was filed in the Sessions Court.

[10] Order 55 r. 2 of the ROC provides for this principle. Order 55 r. 2 reads as follows:

> Order 55 Appeals to High Court from Subordinate Courts
>
> **2. Appeal to be by re-hearing on notice (O. 55 r. 2)**
>
> **All appeals to the High Court shall be by way of re-hearing** and shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from. (emphasis added)

[11] In *United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors* [1993] 3 CLJ 612; [1993] 3 MLJ 45 (SC), the Supreme Court propounded this principle like so (at p. 615 (CLJ); p. 49 (MLJ)):

> The approach to be taken by an appellate court in an O. 14 appeal (note: also an O. 18 r. 19 Appeal) has been settled. **The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing.** (emphasis added)

[12] When I allowed the plaintiff's appeal, I effectively dismissed the defendants' application to strike out. It is clear then that sub-s. 68(1) applies to prohibit a further appeal to the Court of Appeal, since I refused the defendants' application to strike out the plaintiff's claim.

The Rationale For The Amendments To S. 68 (And S. 28) Of The CJA

[13] Focusing specifically on paras. 68(1)(e) to (f) of the CJA, the amendments seek to achieve the purpose of taking away the right to appeal to the Court of Appeal:

(i) when an application for summary judgment is dismissed;

(ii) when an application to strike out is dismissed; and

(iii) when an application to set aside a judgment in default is allowed.

[14] When any of these three decisions or outcomes occur, the effect is that the suit goes to trial. When an application for summary judgment is dismissed, the suit proceeds to be determined at trial. When an application to strike out is dismissed, the suit proceeds to trial to be determined. When an application to set aside a judgment in default is allowed, the suit similarly proceeds to trial to be determined.

[15] The latest amendments to sub-s. 68(1) of the CJA curtail appeals or further appeals to the Court of Appeal. The latest equivalent amendments to sub-s. 28(1) of the CJA have the same corresponding purpose of curbing appeals from the Subordinate Courts to the High Court. The rationale or

purpose is so that the appellate courts are not further inundated with these interlocutory appeals (summary judgment, striking out and setting aside of a default judgment).

[16] The parties get one opportunity or attempt at persuading the first instance court to grant summary judgment, to strike out a suit or pleading, or to sustain a default judgment. And if the first instance court does not grant summary judgment, does not strike out the suit or a pleading, or does not sustain a default judgment then the parties have to go to trial to determine their dispute.

[17] For the ease of reference, sub-s. 28(1) of the CJA is also set out here:

> Section 28 Civil appeals from subordinate courts
>
> (1) **No appeal shall lie to the High Court** in any of the following cases:
>
> (a) subject to any other written law, from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law;
>
> (b) **where a subordinate court dismissed any application for a summary judgment;**
>
> (c) **where a subordinate court dismissed any application to strike out any writ or pleading;** and
>
> (d) **where a subordinate court allowed any application to set aside a judgment in default.** (emphasis added)

[18] These interlocutories – summary judgment, striking out and setting aside a default judgment – are the exceptions, rather than the rule. The rule is to go to trial. This is because the trial process is the essence and the bedrock of our legal process.

The Applicability Of Sub-s. 68(1) Of The CJA

[19] In this matter, the Sessions Court allowed the defendants' application to strike out on 15 April 2022. The plaintiff filed his appeal on 19 April 2022. His right to appeal to the High Court was unaffected because the Sessions Court struck out his suit. The amended sub-s. 28(1) did not affect his right to appeal from the Sessions Court to the High Court.

[20] But I heard and allowed the plaintiff's appeal on 30 December 2022, which was after the date that the amendments to sub-s. 68(1) came into effect (1 October 2022).

[21] I am therefore of the view that the current sub-s. 68(1), specifically through para. (f), is applicable to this appeal, rendering this appeal of no effect.

Brief Reasons For Dismissing The Application To Strike Out

[22] Nevertheless, if for some reason this appeal to the Court of Appeal is permitted to be heard *ie*, the appeal is not deemed null and void, I set out below my brief reasons for dismissing the defendants' application to strike out.

The Pertinent Pleaded Facts

[23] In the plaintiff's statement of claim, he pleaded material facts that included these facts:

(i) the plaintiff worked for the second defendant: the Majlis Bandaraya Pulau Pinang (MBPP). He worked as a 'Pembantu Awam'. He worked for the second defendant for 39 years until he retired in 2020;

(ii) the first defendant is the 'Akauntan Hasil Jabatan Perbendaharaan MBPP';

(iii) the second defendant issued the impugned letter dated 7 February 2019 under the MBPP's letterhead to the plaintiff (the 7 February 2019 letter). The 7 February 2019 letter contained words that are libellous of the plaintiff. The 7 February 2019 letter was not put in an envelope. The 7 February 2019 letter was given, published and distributed to third parties in the 'Jabatan Perkhidmatan Perbandaraan MBPP', who could read and access the contents;

(iv) the purpose for the 7 February 2019 letter was to destroy the plaintiff's reputation and good name as a 'pembantu awam' before he retired;

(v) the plaintiff pleaded the allegedly defamatory words (the impugned words), and the natural, ordinary as well as the innuendo meanings of the impugned words;

(vi) the defendants issued and published the 7 February 2019 letter with malice; and

(vii) as a result, the plaintiff suffered loss and damage. The plaintiff seeks the remedy of damages-general damages, exemplary damages, aggravated damages and special damages of RM429.68.

[24] This RM429.68 is a contentious fact. This RM429.68 relates to the assets belonging to the MBPP that were lost or stolen. The MBPP held the plaintiff responsible for those lost assets. For the lost assets, the MBPP claims RM429.68 from the plaintiff. The MBPP issued a bill to the plaintiff for that amount. And because the plaintiff did not pay the RM429.68, the defendants issued the 7 February 2019 letter and deducted that amount from the plaintiff's salary.

A *The Defendants' Argument: Public Law Versus Private Law*

[25] The defendants argued that as the MBPP is a public authority, the only cause available to the plaintiff, in the context of the facts of this case is for judicial review. The defendants submit that the plaintiff can only file a judicial review application, as the plaintiff is challenging the MBPP's B decision to deduct his salary by RM429.68.

[26] But in my view, a reading of the plaintiff's statement of claim discloses that the plaintiff is not challenging the MBPP's decision nor the process that led to the deduction of his salary. (Note, however, that I am not making a C ruling or a finding about whether there was a "decision, action or omission in relation to the exercise of a public duty or function" per O. 53 r. 2(4) of the Rules of Court 2012 (ROC), which is the rule that governs the procedure for a judicial review proceeding. In my view, O. 53 is not applicable to this defamation suit.)

D **[27]** Instead, I find that the plaintiff's pleadings (statement of claim and reply) disclose that he is suing the defendants under the cause of action of defamation. He asserts that the words used in the 7 February 2019 letter defamed him. The 7 February 2019 letter was made or authored by the first defendant and issued under the MBPP's letterhead.

E **[28]** Defamation is an entirely distinct cause of action than a cause for judicial review.

[29] The plaintiff's statement of claim does not disclose that he is challenging the decision that led to the deduction of RM429.68 from his salary. He is not seeking the usual judicial review reliefs such as a *certiorari* F order to quash that decision. Instead, the statement of claim discloses that he sues for defamation, and he seeks damages as the remedy for the asserted libel.

[30] The plaintiff pleads the fact of the 7 February 2019 letter, and he pleads the impugned words. He pleads that the defendants published the G impugned words to third parties, including persons working in the 'Jabatan Perkhidmatan Perbandaran MBPP'. He pleads the natural and ordinary meaning of the impugned words, as well as the innuendo that can be drawn from the impugned words. And he seeks, not for any administrative or public law reliefs such as *certiorari* or *mandamus* or prohibition, but for the remedy H of damages for the tort of defamation.

[31] The defendants also argue that as this suit should be a judicial review proceeding, the plaintiff has failed to comply with the requirements of O. 53. I find that this argument is untenable and tangential.

I

[32] I find that since the plaintiff is not filing for judicial review, his compliance with the limitation period of three months to file for judicial review is not applicable. It follows then that the issue of whether the plaintiff complied with O. 53 of the ROC, which governs the procedure for judicial review, is also not applicable.

[33] The defendants emphatically argue that the plaintiff's entire claim comes under public law. In fact, the defendants go as far as saying that the plaintiff disguised his claim for judicial review reliefs and remedies, as a claim under a cause for defamation, which is in the realm of private law.

[34] In support of this argument, the defendants cite authorities that include the Federal Court cases of *Ahmad Jefri Mohd Jahri v. Pengarah Kebuadayaan & Kesenian Johor & Or*s [2010] 5 CLJ 865; [2010] 3 MLJ 145 (FC); and *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor* [2021] 8 CLJ 179; [2021] 6 AMR 457; [2021] MLJU 1206 (FC).

[35] But *Ahmad Jefri* (*supra*) is an employment wrongful dismissal case, and the plaintiff there was seeking judicial review reliefs in the first place. And *YKK* (*supra*) is about the decision to terminate a lease over land that is owned by the state. The plaintiff there too was seeking judicial review reliefs.

[36] A brief analysis and elaboration of *Ahmad Jefri* (*supra*) will suffice. A closer look at *Ahmad Jefri* (*supra*), particularly at paras. [20] and [61] reveals the principles that:

(i) if a claim is based only on principles of public law, then O. 53 of the ROC applies, and the cause must be mounted as a judicial review claim;

(ii) if a claim is under private law, even if it involves a public body, O. 53 is not applicable;

(iii) now if a claim is a mixture of public law and private law, then the court must ascertain which of the two areas of law is predominant. So, if it has a substantial public law element, then the O. 53 judicial review process is applicable. If, however, the claim is predominantly under private law, even though it involves a public authority, then O. 53 is not suitable.

[37] Since the defendants are questioning the plaintiff's claim, I again considered the plaintiff's statement of claim. And I find that there is little or no element of public law in the plaintiff's claim, which in all aspects is a defamation claim – a private law claim.

[38] The only trace of a public law element in the plaintiff's claim is the claim for the RM429.68 amount that was deducted from his salary. But I reiterate that the plaintiff is not challenging the decision to deduct his salary. He is suing both the defendants for allegedly defaming him by the contents

of the 7 February 2019 letter and publishing it to third parties. The claim for the RM429.68 is a claim for special damages suffered as a result of the alleged defamation.

[39] So, even if there is a mixture of public and private law in this defamation claim, the predominant aspect of this claim is, to me, clearly private law *ie*, the tort of defamation allegedly committed by the defendants.

Acceding To The Defendants' Argument Will Lead To Undesirable Consequences

[40] To accede to the defendants' argument will lead to several undesirable repercussions:

(i) in exercising its duty as a public authority, the public authority can only be sued under judicial review for judicial review reliefs and remedies. It would mean that public authorities are immune to any other type of suit, except a judicial review suit, even if they commit a tort.

(ii) in the narrower context of defamation law, a public authority, in performing its work, when it makes a decision in writing – the public authority can use all manner of defamatory words to refer to any of the persons involved in the dispute, and the public authority can never be sued for the tort of defamation.

[41] It is my view that these effects or consequences cannot be the extent of the protection or immunity that administrative law gives to public authorities.

The Law On Summary Striking Out

[42] It is well established that so long as the plaintiff's pleadings disclose a reasonable cause of action, the matter should proceed to trial: (i) *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; [1993] 2 AMR 1969 (SC); (ii) *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1; [2016] 2 AMR 795 (FC); (iii) *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425; [2019] 1 MLJ 59; [2018] 6 AMR 529 (FC).

[43] A review of the law on the O. 18 r. 19 striking out procedure is found in the Federal Court case of *Tan Wei Hong* (*supra*), which sets out:

> [16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC); *Hubbuck & Sons, Limited v. Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86; *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

[17] The tests for a striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, *inter alia*, as follows: [2019] 1 MLJ 59 (SC) at 68:

(a) it is **only in plain and obvious cases** that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that **a claim** or answer **is on the face of it obviously unsustainable;**

(c) **it cannot be exercised by a minute examination of the documents and facts** of the case in order to see whether the party has a cause of action or a defence;

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', *ie,* the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[20] The established rule on this point is that the court should not examine the evidence in summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at p. 407:

> … The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial …

This passage was cited with approval by the Privy Council in the Malaysian case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18.

[44] The defendants sought to strike out the plaintiff's defamation claim under limbs (b) (scandalous, frivolous or vexatious) and (d) (abuse of the process of the court). I find that it is not plain and obvious that the plaintiff's

A defamation claim is scandalous, frivolous or vexatious. And that it is not plain and obvious that the plaintiff's defamation suit is an abuse of the process of the court.

[45] I also find that the plaintiff's defamation suit is not obviously unsustainable. The plaintiff has a cause of action in defamation that might be B sustainable through the trial process, with the utilisation of the rather effective pre-trial processes of discovery, interrogatories (if leave is given to administer them), and pre-trial directions (which narrow down and focusses the scrutiny of the court on the pertinent issues in dispute between the parties).

C

[46] It is the plaintiff's right to avail himself of a defamation cause of action, and to sue under that cause. He, of course, has to go to trial, to prove the elements of defamation. But he has every right to commence a suit for defamation.

D **[47]** On the defendants' part, they will have to defend against the defamation suit. But I notice that the defendants did not plead the usual defences against defamation such as justification, or fair comment, or qualified privilege. Rather, the defendants' defences appear to include the plea that – (i) the plaintiff has no claim against the defendants; (ii) the plaintiff E used the wrong mode of originating process; (iii) the plaintiff's claim is an abuse of the court process. These defences do not seem to give a defendant a substantive or tenable defence against this defamation suit.

Appellate Intervention

[48] First, in the Sessions Court's grounds of judgment, the learned F Sessions Court Judge (SCJ) acknowledges that the plaintiff is suing for defamation. The SCJ sets out the remedy that the plaintiff is seeking for defamation, namely damages – general, special, aggravated and exemplary damages. The SCJ also sets out what is actually the defendants' argument, that is, that the plaintiff's only cause of action is for judicial review, to G challenge the MBPP's decision to charge the plaintiff for the lost assets, resulting in the deduction that was made from his salary.

[49] But the plaintiff's claim is not for the remedy of *certiorari,* which is the appropriate remedy if this suit is for judicial review. Instead, the plaintiff's claim is for the remedy of damages for the tort of defamation.

H

[50] Put differently, the plaintiff is not challenging the decision that was handed down by a public authority such as the MBPP. The plaintiff is complaining about the words that are used by the defendants in reference to the plaintiff, which the plaintiff asserts have defamed him.

I

[51] I find that the SCJ has fundamentally failed to appreciate the cause of action of defamation, as well as failed to appreciate the marked difference between a cause in defamation and a cause for judicial review.

[52] Second, the SCJ cites the binding authority of *Bandar Builder* (*supra*), which propounded the principles that include the principle that in considering a striking out application, the court must not go through an exercise of minutely examining the documents, namely examining the affidavit evidence, to decide whether the plaintiff's claim falls under any of the four limbs set out in O. 18 r. 19(1). For example – whether the plaintiff disclosed a reasonable cause of action; whether the plaintiff's claim is scandalous, frivolous or vexatious; or whether the plaintiff's claim is an abuse of the process of the court. Instead, the court is to look at the plaintiff's pleadings, and the defendants' pleadings, to evaluate whether to strike out the plaintiff's claim.

[53] And yet the SCJ, in coming to his decision, proceeded to look at the affidavit evidence, rather than the pleadings. I find that this is a misapplication of the binding procedural law governing striking out applications.

[54] Third, the SCJ sets out the provisions of the Local Government Act 1976 – from s. 3 that relates to the status of local authority areas, to s. 13 in relation to local authorities as corporations, to s. 17 in relation to the powers of a local authority to make rules that provide for the discipline of its officers or employees. The SCJ also refers extensively to O. 53 of the ROC on applications for judicial review. The SCJ further refers to the provisions of the Specific Relief Act 1950, particularly to ss. 44 to 49, which again relate to applications for judicial review.

[55] With respect, I find that in this regard, the learned SCJ has misdirected himself. These references to the law governing judicial review procedure and remedies are a pursuit in the wrong direction. The SCJ's reasoning is tangential to the plaintiff's cause of action for defamation. I find that the SCJ has wrongly directed himself.

[56] Fourth, the SCJ relied on the Federal Court authority of *Ahmad Jefri* (*supra*), where the plaintiff there filed a writ for reliefs and remedies that relate to his employment. The prayers there included a prayer for a declaration that his dismissal from his employment was void; an enquiry into his salary and entitlements; and damages for wrongful dismissal. The Federal Court held that the plaintiff there should have filed an application for judicial review instead of a writ action, and that O. 53 was indeed applicable to him.

[57] In our case here, however, I reiterate that the plaintiff's cause is for defamation, and O. 53 is not applicable. Instead, it is O. 78 for defamation actions that is applicable to the plaintiff's claim. And the plaintiff appears to have complied with the obligation to give particulars, as prescribed under O. 78 of the ROC.

[58] With respect, it is my view that the SCJ's reference to and reliance on *Ahmad Jefri* (*supra*) to summarily strike out the plaintiff's defamation suit, is an error that I find is elementary.

[59] In the circumstances, I find, with respect, that the SCJ was plainly wrong in his decision to strike out the plaintiff's claim on the ground that the plaintiff failed to follow the requirements of O. 53 in this defamation (not judicial review) suit.

Conclusion

[60] For these reasons, I allow the plaintiff's appeal, with costs of RM15K here and below – since the SCJ gave RM3K as costs for the striking out application and RM5K as costs for the suit. Costs are subject to the allocatur.

[61] I am, in effect, dismissing the defendants' striking out application (encl. 13 in the Sessions Court proceeding). The SCJ's order dated 15 April 2022 is set aside, and the parties are directed to go back to the Sessions Court for case management and for the disposal of the suit proper.